Tube Turns, a Division of Chemetron Corp. *and* Richard Webster. Case 9-CA-15745

March 1, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 15, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent's discharge of employee Webster was not unlawful, we conclude that on the singular facts of this case the General Counsel has not established a violation of the Act by a preponderance of the evidence. Additionally, we do not rely on the Administrative Law Judge's finding that Webster previously had been discharged by another employer for falsifying information on his employment application.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: Upon a charge filed on August 27, 1980 the General Counsel issued a complaint on October 6, alleging that Tube Turns, a Division of Chemetron Corp. (hereinafter called Tube Turns or the Respondent), unlawfully discharged Richard Webster in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, herein called the Act. By timely answer the Respondent denied any wrongdoing. A hearing was held before me on June 8 and 9, 1981, in Louisville, Kentucky.

Upon the entire record, my observation of the demeanor of the witnesses and consideration of the post-hearing briefs, I make the following:

FINDINGS OF FACT

JURISDICTIONAL FINDINGS

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, has at all times material herein been engaged in the manufacture of steel forgings at its Louisville, Kentucky, facility. During the past 12 months, a representative period, Respondent in the course and conduct of its business operations sold and shipped goods, products, and materials valued in excess of $50,000 from its Louisville facility directly from points outside the State of Kentucky. Upon the foregoing facts, the General Counsel alleges, the Respondent concedes, and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Richard Webster was hired by Tube Turns in September 1979 as a third-shift maintenance mechanic I, the highest classification for such positions.[1] He was a capable employee, receiving a satisfactory evaluation on completing a 60-day probationary period, and was granted two pay increases during his 11 months with the Company.

However, Webster soon began expressing dissatisfaction with certain working conditions which, the General Counsel contends, ultimately led to his discharge on August 13, 1980. Thus, in the latter part of 1979, and into the first few months of 1980, he filed a number of grievances affecting such matters as the subcontracting out of maintenance work, vacation scheduling, and the distribution of overtime. According to Henry Wirth, third-shift steward for the United Steelworkers, Webster registered more grievances than any other employee in this period of his employment. Management apparently was not kindly disposed towards Webster's persistent complaint-filing, for when Wirth attempted to find out why the processing of Webster's grievances was delayed, the plant superintendent informed him that management was in no hurry to dispose of them.

In February 1980, turning to a different strategy to voice his discontents, Webster initiated a campaign to sever the maintenance department from the balance of the production and maintenance unit represented by the United Steelworkers. Toward this end, Webster circulated a petition seeking signatures of those supporting severance, passed out leaflets to his coworkers, and spent considerable time advocating the merits of such a move-

[1] Tube Turns' formal job description requires, *inter alia*, that class I mechanics perform maintenance repairs and construction on a diversified and complete line of machine and forging equipment, perform periodic inspections of various equipment and systems, and prepare written status reports. This required 3 to 4-1/2 years' experience.

ment. His efforts did not go unnoticed for, as coworker Derrill Barnickle testified, third-shift Foreman Eric Forrester commented that Webster was a good mechanic but "the problem I have got with him is his mouth." Forrester also told another mechanic, John Montgomery, that Webster was involving himself in matters that did not concern him.

The severance petition was filed with the Board's Regional Office on March 28, 1980. Several weeks later the Respondent learned that Webster was one of a handful of employees subpenaed by the Government to appear as a witness at the hearing on the petition. During the course of this hearing on April 20 and 21, it became apparent to several management officials that Webster was a principal actor in the drive for severance. By decision and order of May 30, 1980, the Regional Director denied the petition.[2] Approximately 1 month later, an article appeared in the local newspaper which described the severance drive and characterized Webster's role in it as that of underdog. This article found its way into Webster's personnel file.

Webster was a key figure in several other proceedings which posed legal challenges to the Respondent. In April 1980, he was the named petitioner in an action filed in a Kentucky state court which sought to enjoin the Respondent from assigning maintenance employees to work in certain areas without the aid of maintenance helpers. The case was dismissed for lack of jurisdiction on May 8, 1980. Then, in July, Webster's name was joined as a discriminatee in a charge previously filed with the Board alleging harassment of the maintenance mechanics by assigning them to perform dangerous duties without assistance because of their involvement in the severance movement. Subsequently, the charge was withdrawn, but while it was under investigation the Board's agent and counsel in this case questioned several of the Respondent's supervisors about statements they allegedly made to Webster.

Webster's final provocation came in a letter to the corporate president dated July 15, 1980, in which he complained about mismanagement and waste in subcontracting out of maintenance work which he contended could be performed more effectively in-house. This letter, like the newspaper article, was inserted in his personnel folder.[3]

Contrary to the General Counsel's position, the Respondent submits that Webster was terminated only after an investigation disclosed that he had made substantial misrepresentations on his employment application.

The Respondent's practice was to run reference checks on applicants prior to offering employment. In fact, the employment application contains a waiver in which the jobseeker authorizes:

> . . . investigation of all matters contained in this application and agree(s) that if, IN THE JUDGMENT OF THE COMPANY, ANY MISREPRESENTATION OR OMISSION HAS BEEN MADE BY ME HEREIN OR THE RESULTS OF SUCH INVESTIGATION ARE NOT SATISFACTORY, ANY OFFER OF EMPLOYMENT MADE BY THE COMPANY MAY BE WITHDRAWN OR MY EMPLOYMENT WITH THE COMPANY MAY BE TERMINATED. . . .

In the summer of 1979, the Respondent was expanding its operations and its work force. Webster was hired during this period together with 60 or 70 other new employees. Consequently, Ronald Rush, then manager of staff personnel, authorized Ed Leslie, a junior personnel officer, to offer employment without first making the normal reference checks. Although Leslie was reminded to go forward with this work on several occasions over the next few months, he made no effort to review Webster's background.

In February 1980, Elias Vaughn began to assume the job duties previously performed by Rush, who, in turn, took over Vaughn's position as manager of industrial relations. During the transition period that occurred, Leslie continued to delay performing the background checks. Not until late February did an effort commence to examine Webster's references. At that time, while Kenneth Crawford, Respondent's director of human resources, was conferring with various plant officials in preparation for a new round of collective-bargaining negotiations with four unions representing separate groups of employees, several supervisors mentioned to him that Webster was a troublemaker, someone who did not fit in and who spent all his time talking on the job. Crawford noted Webster's name and shortly thereafter requested Leslie to check Webster's record and references. Leslie then contacted Gates Rubber Company, the firm listed on Webster's employment application as his previous employer, and learned that Webster had not quit in September 1979 as stated in his application, but left there 5 months earlier in May. Based on this discrepancy, Leslie submitted a memo to Rush on March 25, 1980, recommending Webster's immediate termination.

Believing that further verification was in order, Rush directed Leslie to pursue the matter. However, not until June, when negotiations for three of the four collective-bargaining agreements were almost complete, did Leslie advise Vaughn of his failure to complete the reference checks. Having experienced some difficulty in contacting the Gates firm in April, and because Tube Turns was about to shut down for its regular 2-week layoff in July, Vaughn referred the Webster investigation and a matter involving another employee to a private investigating firm, whose services he had used in well over 50 other cases.

In the latter part of July, the investigator reported to Vaughn that neither the post office nor the telephone company had any information as to the existence of a business or company under the name F. J. Webster, the employer for whom the charging party claimed he had served an apprenticeship during his employment from 1964–76.[4] The investigator further determined that Web-

[2] *Tube Turns, a Division of Chemetron Corp.*, Case 9–RC–13117.

[3] *Richard Webster, et al. v. Tube Turns Division of Allegheny Ludlum Industries, Inc.*, 80–CI–03518 (Jefferson Circuit Court, KY).

[4] F. J. Webster apparently was the Charging Party's father.

ster's academic and vocational credentials were not all they appeared to be on the application. He did confirm that Webster attended Jefferson Community College and Bellermine College for one semester.[5] However, the investigator was unable to obtain verification that Webster attended or completed courses as he had reported, in welding, blueprint reading, pipefitting, and plumbing at the trade school run by the Elizabethtown, Kentucky, Community College.

Additionally, the investigator advised Vaughn that Webster had a record of several arrests although he denied having "been involved in a criminal proceeding as a defendant" on the employment form.

At the conclusion of the plant shutdown, Vaughn also attempted to verify some of the information Webster furnished. First, he contacted Robert Niles, industrial relations director at Gates Rubber. In a memo dated July 24, 1980, summarizing his conversation with Niles, Vaughn confirmed that Webster quit Gates in May; that contrary to Webster's contention, he was a class B, not as he alleged, a class AA mechanic, having failed the exam for the higher classification, and that he had not served an apprenticeship program with Gates, for none was offered there. Further, Vaughn learned from Niles that Webster listed a period of employment with the Coca-Cola Company, which he had omitted from the employment application filed with the Respondent.[6]

Vaughn next called an unnamed personnel official at Coca-Cola who informed him that Webster was employed there as a service department repairman from September 1976 until February 1977. Coca-Cola terminated Webster after determining that he had falsified his employment application by listing longer periods of employment with some companies for whom he had not worked and claiming academic credentials which he had not attained. During this same week, Vaughn discovered that Webster had failed to mention a prior period of employment with Tube Turns in 1966.

On the basis of this information, gathered for the most part in the last week of July, Vaughn and Rush agreed that Webster should be terminated when he returned from a disability leave taken after he was injured on the job a month earlier. As Rush explained, company policy dictating discharge for falsification of an employment application was predicated on a:

> . . . multitude of reasons, one of which, if he falsified his application, he can very well falsify something else. Secondly, if he falsified things dealing in elements of safety, we may find an unsafe employee with a high liability on our hands. If he falsified his application with regard to his background as to training and we put him out on a critical job, all by himself as a journeyman, a maintenance mechanic may very well . . . he may create quite a problem. And we're talking about millions of dollars in terms of rather large equipment. Rather sophisticated equipment in some cases.

The record shows that the Respondent invoked this policy on several occasions both prior and subsequent to Webster's dismissal. Thus, in 1974, an employee, whose excessive absenteeism led to an investigation of her references, was terminated when it was discovered that she had invented a prior period of employment. In the same year, another employee, Roosevelt Hurley, was discharged for the same cause. Three other employees were discharged for falsification of other company records.

When Webster returned to work on August 13, Vaughn and Rush advised him orally and by letter that he was being discharged because of the "significant misrepresentation(s) and/or omissions, particularly in the areas of education and training and past employment" in his application. When provided an opportunity to explain, Webster insisted that he had expressly prohibited any contract with his prior employer, that he had never before worked for Tube Turns, and had omitted mentioning his employment with Coca-Cola because it was only part time and he still was working there.

Contrary to at least one of these assertions, the Respondent had records documenting Webster's previous employment with Tube Turns. In fact, his termination paper contained a supervisor's comment that he would not recommend Webster for rehire based on his performance. Nevertheless, Vaughn suggested to Webster that if he obtained proof to support some of the information in his application, the Company might reconsider its termination decision.

Unfortunately, at his grievance hearing in August, Webster made matters worse by presenting certificates of attendance in four courses ostensibly offered by the Elizabethtown trade school which management determined and Webster admitted were fraudulent. Webster did obtain a letter dated August 19, 1980, from the principal of the Elizabethtown vocational school which explained that while there was no record of Webster having participated in its full-or part-time instructional programs, several persons recalled that he was enrolled in a short-term blueprint reading and pipewelding course offered by a local industry utilizing the school's facilities when it was not in session.

At the hearing in this matter, Webster tried to exculpate himself further by stating that he had taken courses in plumbing, welding, and pipefitting offered by a local union, that, although he had not listed his prior employment with Tube Turns, he had brought it to the attention of his supervisor, and repeated his assertions that he left Gates as a class A mechanic and omitted his employment with Coca-Cola because it was a part-time job. He also denied having ever filed a workmen's compensation claim. However, the Respondent produced a document which indicated that Webster worked a 40-hour week for Coca-Cola and left there in 1976. Moreover, the Respondent adduced testimony from Niles, industrial rela-

[5] Webster represented he attended Bellermine from 1965-66 and the Jefferson Community College from 1966-67. These dates convey the incorrect impression that Webster was enrolled at these schools for an entire year. However, if each semester terminated in January, then it is possible that these dates were accurate.

[6] Niles testified at the hearing that he did not recall telling Vaughn about Webster's prior employment with Coca-Cola. However, I conclude that he must have done so since this information, with other data which Niles admittedly related to Vaughn during their telephone conversation, was concluded in Vaughn's memo written contemporaneously with the call.

tions manager at Gates Rubber who confirmed much of the information he previously related to Vaughn including the fact that Webster went from a grade C to no more than a grade B mechanic and did not participate in an apprenticeship program. Further, the Respondent produced evidence that Webster had indeed filed a claim for workmen's compensation benefits.

Discussion

A resolution of the issue in this case, that is, whether Webster was terminated for his protected concerted activities or for testifying under the Act, fits precisely into the analytic framework set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). There, the Board stated that where both legitimate and wrongful motives exist for an employer's imposition of discipline upon an employee, the General Counsel bears the burden of making a *prima facie* showing that on the record as a whole the protected conduct of the discharged employee was a factor in the employer's decision. Thereafter, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's protected conduct. *Id.* at 1089. Accord, *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Here, the General Counsel has produced ample evidence that the Charging Party was engaged in a number of protected concerted activities which could not help but create friction between him and the Respondent. Within months after he began working for Tube Turns he was filing more grievances than other employees in his unit. The uncontradicted testimony of shop steward Wirth that management purposely delayed processing these complaints establishes at the very least, that Webster's zealousness was viewed with disfavor.

By February when Webster had begun agitating for a separate union for the maintenance mechanics, he was identified by several supervisors as a troublemaker, a familiar euphemism for one who is engaged in unwelcome labor activity. Although there is no concrete proof that Crawford knew of Webster's role in the severance effort, the supervisors' comments to him were sufficient to trigger an inquiry into Webster's background. The General Counsel submits, and I am inclined to agree, that the provocation for the investigation and its timing, some 6 months after Webster was hired, casts suspicion on the legitimacy of the Respondent's motives in pursuing Webster's credentials at that time.

By mid-April, the Respondent certainly knew of Webster's leadership role in the severance campaign and contested that effort as well as the challenge in a Kentucky state court to its work assignment practices. None of these actions was likely to endear Webster to the Respondent. To make matters worse, in July, Webster (1) was joined as a discriminatee in a charge filed against the Respondent with the Board; (2) was cast into a heroic role as the spokesman for the severance drive; and (3) was author of a letter to the Company's president criticizing local management for waste and inefficiency. In August, several of Respondent's officials were questioned by a Board agent about statements purportedly made to Webster, thereby revealing that he had supplied information to the Board. After all this, it is not difficult to imagine the Respondent's displeasure with Webster's incessant nipping at its heels.

Given the persistence and visibility of Webster's concerted activities, taken together with the curiously belated timing of the inquiry into his background and his otherwise satisfactory performance on the job, I conclude that the General Counsel has met the burden of proof requisite for a *prima facie* showing of a discriminatory discharge. However, an evaluation of the record as a whole compels the further conclusion that the Respondent has satisfied its burden; it has shown by a preponderance of the evidence that Webster's dismissal would have occurred in any event, once it was determined that his employment application was riddled with serious distortions and omissions.

Although, as noted above, some suspicion attaches to the reasons which initially prompted the Respondent's probe of Webster's credentials, I do not find that this tainted the entire investigation or its results.

It is undisputed that the Respondent's failure to investigate Webster's background prior to an offer of employment was a departure from its normal practice, caused by exceptional circumstances. However, the General Counsel made no attempt to show that the Respondent abandoned its practice or that it would not have, at some other point in time, begun an identical inquiry. Moreover, there was no evidence that Leslie was given any reason for examining Webster's record or encouraged to conclude his investigation with a recommendation for discharge. Rather, after determining that the information in the application was false, Leslie apparently made an independent judgment that discharge was appropriate in accordance with company policy.

The Respondent could have terminated Webster immediately. Instead, it decided to pursue the matter. Even if its restraint was due to Webster's involvement in the severance movement, the Respondent cannot be faulted, for, "In such circumstances prudence would constrain any employer to exercise caution, and to defer precipitate action. . . ." *L.B. Darling Division of Idle Wild Farms, Incorporated*, 254 NLRB 691, 694 (1981).

On discovering that Webster misrepresented the date he quit his previous job and left a gap of 5 months in his recent employment history, it was natural for the Respondent to wonder what he was attempting to conceal. Therefore, I find nothing sinister in the Respondent's efforts to probe Webster's application in great depth. Once the door was opened, the Respondent discovered that the statements on that application bore only a marginal relationship to the truth.

Thus, in Vaughn's conversation with Niles, he discovered that Webster was a class B rather than a class A mechanic at Gates Rubber and that he had not served an apprenticeship there. Such disclosures furnish ample justification for the Respondent's doubts as to Webster's qualifications as a class I mechanic at Tube Turns, for even if he performed adequately in the past, there was no assurance he would do so in the future.

As if this were not enough, Vaughn discovered more: Coca-Cola had discharged Webster for falsifying his job

application, although he had been employed there for a year. This suggests that the Respondent was not unique in penalizing Webster for the same reason after a similar lapse in time.

Although the General Counsel contends to the contrary, the record shows that the Respondent made diligent and extensive efforts to locate F. J. Webster. When its efforts proved unsuccessful, the Respondent was legitimately concerned since the Charging Party claimed that he had served part of his apprenticeship with this employer. If F. J. Webster was a bona fide business headed by the Charging Party's father, as he claimed, it is difficult to understand why he failed to produce a single witness or any documentation corroborating his employment there. By failing to furnish any real evidence supporting his claims when such documentation should have been within his possession, an inference arises that such evidence does not exist.

Respondent further determined that Webster's vocational training and educational background were almost as bogus as his employment experience. When confronted by the Respondent with the frequency of his representations about courses allegedly taken at the Elizabethtown vocational school, Webster's response was to produce forged cards which he characterized as merely being altered.[7] Even if I accepted Webster's characterization, it does not diminish his propensity for deceit.

The General Counsel claims that the Respondent's resort to a private investigator was so unusual as to expose its discriminatory purpose. I disagree. Although reliance on a private investigator was not commonplace, neither was it unprecedented as the record plainly shows. The General Counsel further urges that the Respondent's policy with respect to discharge for falsification of records was invoked previously in circumstances so distinguishable from those attending Webster's termination as to demonstrate that he was treated in a disparate manner. This argument is equally unconvincing for variations in the factual circumstances surrounding dismissals are more the rule than the exception. More to the point is that Webster's misrepresentations were far more egregious than those of the other employees discharged on the same ground. Finally, the General Counsel urges that the reason assigned by the Respondent for the dismissal is pretextual in light of Webster's competent job performance. In so doing, the General Counsel fails to credit an employer's legitimate apprehension that lack of adequate training may result in deficient performance for which it may be held liable. Moreover, an employer is entitled to ferret out from its midst a thoroughly dishonest employee, even if he happens to be proficient at his tasks. Given the abundant evidence of Webster's deliberate misrepresentations, the Respondent could hardly continue him in its employ, for to do so would be to condone such conduct and make it exceedingly difficult to insist thereafter on honesty from its other employees. That Webster was deeply involved in concerted activities ought not to shield him from adhering to the same standards imposed on other employees. In these circumstances, I conclude that the Respondent discharged him for good cause.

Even after advising Webster of the grounds upon which his dismissal rested, he still had an opportunity to clear himself during the processing of his grievance. Rather than righting matters, he compounded them by generating fake cards certifying attendance in vocational courses. At the hearing he continued to fabricate a fictitious past. Thus, he flatly denied having filed a workmen's compensation claim and asserted he was employed at Coca-Cola part time, when the record established the contrary. In the final analysis, Webster succeeded only in proving that he was a totally untrustworthy employee and witness.

The Respondent may have welcomed the opportunity to fire Webster. Nevertheless, even where an employer may wish to dispense with an employee whose protected activities have made him an anathema, a subsequent discharge may not be discriminatory if the employee obliges the employer by providing a valid, independent reason for the discharge by engaging in conduct for which he would have been terminated in any event. See *Klate Holt Company*, 161 NLRB 1606, 1612 (1966); *Anderson-Rooney Operating Company and Ninth and Detroit Building Corporation*, 134 NLRB 1480, 1495 (1961).

Although the General Counsel has presented some circumstances in the present case which tend to cast doubt on the legitimacy of the Respondent's asserted motive, the Respondent has succeeded in surmounting these doubts by a preponderance of the evidence that Webster's discharge in August 1980 would have occurred independently of his involvement in concerted activity. Accordingly, I shall recommend dismissal of the allegations in the complaint that the Respondent violated Section 8(a)(1), (3), and (4) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Tube Turns, a Division of Chemetron Corporation, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The United Steelworkers, AFL-CIO, representing the production and maintenance employees at the Respondent's Louisville, Kentucky, facility, including those employees who sought severance from the unit in Case 9-RC-13117, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4), as alleged in the complaint.

[7] At the hearing, Webster admitted that he "altered" the cards because Gates would not relinquish the originals to him, thereby implying that these cards duplicated the ones which were in Gates' file. However, in fabricating these cards, he assigned a completion date to a course in welding at a time when he was no longer employed by Gates and offered grossly exaggerated hours of attendance. Further, when it became apparent that neither Gates nor the vocational school would verify his attendance at a course in plumbing, he suddenly recalled that he took this subject under the auspices of a local union.

4. Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[8]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.